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No. 663

In the Supreme Court of the United States

OCTOBER TERM, 1962

JAMES R. CROWE AND WALTER J. SABNITZ, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a–10a) is reported at 308 F. 2d 537.

JURISDICTION

The judgment of the court of appeals was entered on September 20, 1962 (V. 101).[1] A petition for rehearing was denied on October 16, 1962 (V. 110). An order of November 8, 1962, by Mr. Justice Harlan extended the time for filing a petition for a writ of certi-

[1] The certified record consists of five volumes prepared for use in the court of appeals which will be referred to by Roman numeral. The record of the district court will be referred to as "R."

orari to and including December 14, 1962, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner Sarnitz could properly be cross-examined as to a previous conviction by an American military court after he had denied on direct examination ever being convicted of a crime.

2. Whether the prosecutor's remarks in closing argument, criticizing the practice of Americans offering money to corrupt Latin American politicians, were properly held an insufficient basis for reversing petitioners' convictions on wire fraud charges.

STATEMENT

Defendants Whiting, Crowe and Sarnitz, after a jury trial in the United States District Court for the Southern District of New York were convicted on three substantive counts charging separate violations of 18 U.S.C. 1343 by the sending of cables between New York and Rio de Janeiro in furtherance of a scheme to defraud, and on a fourth count charging conspiracy. Petitioner Crow was sentenced to imprisonment for four years and ten months on each count, and petitioner Sarnitz to four years and five months on each count, the sentences of each petitioner to run concurrently (R. 1464, 1465). On appeal the convictions were affirmed (R. 1468–1469, 1488; V. 101).

The general nature of the crime is set forth in the opinion of the court below and in the government's

brief in opposition in the companion case of *Whiting* v. *United States*, No. 613 Misc., this Term.

1. On direct examination petitioner Sarnitz was asked if he had ever been convicted of a crime and answered, "No, sir" (III. 143). During cross-examination of Sarnitz, in a hearing outside the presence of the jury, his counsel argued that only a previous conviction, not a mere arrest, could be shown, and the court assured counsel that a conviction was involved (I. 2). When the jury was recalled Sarnitz admitted that he had been convicted of a crime (I. 2). This colloquy followed (I. 3–4):

> By Mr. Hyde [government attorney]:
>
> Q. And will you tell us for what crime you were convicted?
>
> A. From the military government which was at this time in Austria. I think it was the possession of—I don't recall exactly any more. I think 15 or 17 bottles, those 200,000 unit bottles which I bought from an American soldier of penicillin.
>
> Q. Penicillin?
>
> A. Right.
>
> Q. You were charged with purchasing penicillin from American soldiers?
>
> A. Yes.
>
> Q. And was there a second count in that conviction?
>
> A. Not that I recall.
>
> Q. Well, specifically were you charged with a conspiracy to sell this penicillin at black market prices?
>
> A. I don't recall. This was all in English and at this time——

Q. It is partly in German, isn't it? The charge sheet and conviction are in German as well.

A. Whatever it is here. If it was conspiracy then it is conspiracy. I cannot argue about that. But it was actually the possession of 15 or 17 bottles of penicillin what I bought from an American soldier. And when I asked for my immigration visa to the United States at the consulate at Salzburg where I had to state about this whole case, which I did, I was told that it was pardoned because after three months from General—I think it was General Clark, I got pardoned and I don't have to mention it any more. So I was advised at the consulate at Salzburg.

Q. What sort of sentence did you receive from the Court?

A. I had a three-year sentence for this and I was pardoned after three months.

2. On cross-examination, defendant Whiting explained that, as part of a proposed transaction by the Bank of Brazil in placing money in Crowe's account, a brokerage or service fee of $1,800,000 was to be paid to a Brazilian government official, Dr. Guimaraes, who in turn would distribute part of it to several other Brazilian officials. Whiting testified that such payment would be a service fee, not a kickback (III. 137–140). Whiting gave this testimony (III. 140):

Q. I think you testified on the 14th of February that this is the common ordinary way of doing business in South America?

A. I think it is a very general way of doing business in South America, yes.

Q. And this is the way in which you, Crowe and Sarnitz did business?

A. Well, I can't testify for Mr. Crowe and Mr. Sarnitz. I will say in regard to this transaction that's what we had agreed to.

In his closing argument government counsel referred to Whiting's calling the proposed payment to the Brazilian officials a service fee as part of the ordinary way of doing business with Latin American governments. The prosecutor stated that we "would call it a kickback, if not just a plain bribe of a Government official" (R. 1337). He then stated (R. 1337–1338; I. 5–6):

> Well, all I say in that regard—I won't dwell on it—if this is the way in which Americans down in Latin America do business offering close to $200,000,000 [sic][2] to corrupt politicians who would be taking the money of their own government which is so badly needed to raise the standard of living down in those countries, if that is the way that Americans—who by the way never go near the U.S. Embassy in the course of their dealings—if that's the way these Americans do business down in Latin American countries I think it is little wonder that we read in the papers these days of anti-American rioting in the streets down there.
>
> Mr. LUNNEY [Counsel for defendant Whiting]. Objection, your Honor. Unduly prejudicial.
>
> The COURT. Overruled.

[2] This figure is apparently a typographical error and should read $2,000,000.

ARGUMENT

1. There is no substance to petitioner Sarnitz' contention that his cross-examination by the prosecutor was unfair and improper (Pet. 3–5). See Statement, *supra,* pp. 3–4. Since Sarnitz put his good character in issue by testifying on direct examination that he had never been convicted of a crime, it was entirely proper for the prosecutor to cross-examine him as to his previous conviction by the American military government authorities in Austria in 1946. *United States* v. *Colletti,* 245 F. 2d 781, 782 (C.A. 2), certiorari denied *sub nom. Russo* v. *United States,* 355 U.S. 874; *United States* v. *Silver,* 235 F. 2d 375, 378 (C.A. 2), certiorari denied, 352 U.S. 880.

Originally counsel for Sarnitz was concerned with excluding cross-examination as to any previous arrests of Sarnitz as distinguished from convictions. After counsel was convinced in proceedings out of the presence of the jury that a conviction was involved, the questions now complained of were asked and answered without objection. Sarnitz himself testified that he had been convicted of possession of penicillin bought from an American soldier. Thereafter the prosecutor asked the additional question whether he had been charged with purchasing penicillin from American soldiers. The military charge was unauthorized possession of property of the armed forces and this was equally punishable whether the property was bought from American soldiers or obtained by other illegal means. Petitioner had also been charged in a second count with conspiracy as to the attempted sale

of the property illegally possessed. Such a sale was colloquially called a black market sale. Accordingly it was not improper to ask Sarnitz whether he had been charged with a conspiracy to sell penicillin at black market prices.

2. As to the challenged remarks of the prosecutor in closing argument (see Statement, *supra*, pp. 4–5) the court below stated "While we are not to be understood as sanctioning such latitudinous remarks, we do not believe that they were sufficiently prejudicial to require reversal" (Pet. App. 10a).

This ruling was correct. The remarks merely criticized the alleged practice of Americans in offering money to corrupt Latin American politicians. The comment did not refer directly to petitioners Crowe and Sarnitz at all, being aimed more at defendant Whiting. Whiting had testified, not as part of the government's case, but as a defense witness, as to the large amounts of money which were to be paid to the Brazilian officials. In these circumstances it was understandable that the prosecutor referred to this testimony in closing argument. At most the prosecutor's remarks were "minor aberrations in a prolonged trial" and did not afford a basis for reversal of petitioners' convictions. *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 239–240.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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